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Contracts—Contingent Fee for Expert Witness

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stances there is some question as to the soundness of the reasoning of the majority opinion in determining that the sharing of counsel in the instant case means that the accused was denied the effective assistance of counsel. The petitioner's appeal on the ground of denial of his rights under the Sixth Amendment was obviously a lawyer's afterthought.

Further, the decision is regrettable in the sense that it comes on the heels of a recent line of cases in which the Supreme Court looked very much to the realities in order to determine if the right to counsel had been denied. In *Powell v. Alabama*¹³ the Supreme Court went behind the record to examine the background of the defendants before determining that they had been denied the right to counsel since counsel had been appointed in too haphazard a fashion and at too late a date to provide for adequate pre-trial preparation, which is a fundamental part of the right. In a later case the Supreme Court held that a denial by the trial court of a continuance requested by the defendant did not deprive the defendant of his constitutional rights if it did not appear that such continuance would lead to a stronger defense or lead the defense to obtain more witnesses.¹⁴ In a matter involving the competency of attorneys assigned to represent the accused the Supreme Court held that the failure of counsel to reserve certain exceptions was, at worst, according to the facts, mere negligence or error of judgment and not a denial of the effective assistance to counsel.¹⁵

This line of cases involved primarily the right to counsel as contained in the Fourteenth Amendment. It may well be that the Supreme Court in the instant case arising under the Sixth Amendment is proceeding upon the theory that " * * constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry * * *"¹⁶ The dissenting opinion in the instant case offers the better view, however, when it states that the guarantees of the Bill of Rights are not mere abstractions but must be viewed objectively. Only by such treatment can their importance be preserved and the guarantees be prevented from becoming hollow refuges from the law.

E. P.

CONTRACTS—CONTINGENT FEE FOR EXPERT WITNESS—[Missouri].—Plaintiff, a psychiatrist, brought suit on a contract providing compensation of \$25,000 for his services as an expert witness in a will-contest, payment of the fee being contingent upon the success of that litigation. His services consisted of reading depositions, hearing the testimony of witnesses, and holding conferences with witnesses and counsel, upon which his opinion

also represented by one George Callaghan and himself. However, Stewart was the most active defense attorney during the trial.

13. (1932) 287 U. S. 45.

14. *Avery v. State of Alabama* (1940) 308 U. S. 444.

15. *Peterson v. State* (1933) 227 Ala. 361, 150 So. 156, cert. den. (1934) 291 U. S. 661.

16. *Snyder v. Mass.* (1934) 291 U. S. 97, 116.

as to the testator's sanity was based. At the close of the trial defendant offered an instruction in the nature of a demurrer to the evidence, contending that the contract was against public policy and void. The trial court refused the instruction, and defendant appealed from that ruling. *Held*, the contract was valid, and the mere fact that plaintiff's compensation was contingent upon the outcome of the suit did not make it against public policy. *Barnes v. Boatmen's National Bank of St. Louis*.¹

Contracts with an attorney for procuring testimony to be used in evidence,² or for procuring evidence of a given state of facts,³ on a contingent fee basis have been condemned by the courts as contrary to public policy, because they hold out inducements to commit fraud or perjury. However, where the compensation is fixed the contract has been upheld, whether the person employed is an attorney-at-law, a professional detective, or a mere layman.⁴ A contract between a layman and a lawyer, by which the former would secure clients for the latter in return for a share of the fee received is, by the better view, void,⁵ but another rule holds that the parties are not *in pari delicto*, and the layman may enforce the contract.⁶

1. (Mo. 1941) 156 S. W. (2d) 597.

2. *Goodrich v. Tenney* (1893) 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459; *Sherman v. Burton* (1911) 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87; *Hughes v. Mullins* (1907) 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209.

3. *Neece v. Joseph* (1910) 95 Ark. 552, 129 S. W. 797, Ann. Cas. 1912A, 655; *Harris v. Moore* (1929) 120 Cal. App. 412, 283 Pac. 76; *Gillett v. Bd. of Supervisors of Logan County* (1873) 67 Ill. 256; *Haines & Lyman v. Lewis* (1880) 54 Iowa 301, 6 N. W. 495, 37 Am. Rep. 202; *McMahon v. Hardin* (1929) 10 La. App. 416, 121 So. 678; *Burns International Detective Agency v. Doyle* (1922) 46 Nev. 91, 208 Pac. 427, 26 A. L. R. 600; *Wellington v. Kelly* (1881) 84 N. Y. 543; *Lyon v. Hussey* (1894) 82 Hun 15, 31 N. Y. S. 281; *Gross v. Campbell* (1928) 118 Ohio St. Rep. 285, 160 N. E. 852; *Duteau v. Dresbach* (1920) 113 Wash. 545, 194 Pac. 547, 16 A. L. R. 1430; *Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.* (1912) 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847, Ann. Cas. 1914C, 449; *contra*, *Wood v. Casserleigh* (1900) 14 Colo. App. 265, 59 Pac. 1024, *aff'd* (1902) 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138 (contract not invalid *per se*).

4. *Lucas v. Pico* (1880) 55 Cal. 126; *Harris v. More* (1886) 70 Cal. 502, 11 Pac. 780; *Millen v. Coakley* (1914) 217 Mass. 9, 104 N. E. 468; *Haley v. Hollenback* (1917) 53 Mont. 494, 165 Pac. 459; *Singer Mfg. Co. v. City Nat. Bk.* (1907) 145 N. C. 319, 59 S. E. 72; *Cobb v. Cowdery* (1867) 40 Vt. 25, 94 Am. Dec. 370; *Wilkinson v. Oliveira* (1835) 1 Bing. N. Cas. 490, 131 Eng. Reprint 1206; *Yeatman v. Dempsey* (1860) 7 C. B. (N. S.) 628, 141 Eng. Reprint 962, *aff'd* (1861) 9 C. B. (N. S.) 881, 142 Eng. Reprint 347; *see also Chandler v. Mason* (1829) 2 Vt. 193.

5. *Meguire v. Corwine* (1879) 101 U. S. 108; *Alpers v. Hunt* (1890) 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; *Holland v. Sheehan* (1909) 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687; *Langdon v. Conlin* (1903) 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 103 Am. St. Rep. 643, 2 Ann. Cas. 834; *Burt v. Place* (N. Y. 1826) 6 Cow. 430; *Lyon v. Hussey* (1894) 82 Hun 15, 31 N. Y. S. 281.

6. *Casserleigh v. Wood* (1900) 14 Colo. App. 265, 59 Pac. 1024, *aff'd* (1902) 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138; *Dunne v. Herrick* (1890) 37 Ill. App. 180; *Kelerher v. Henderson* (1907) 203 Mo. 498, 101

Turning from contracts for procuring evidence to contracts with witnesses, we find that an agreement to compensate a lay (or *fact*) witness in an amount in excess of the legal fees, where the witness resides within the jurisdiction and is amenable to process therein, for attending as a witness and testifying only as to facts within his knowledge, is contrary to public policy and void.⁷ Such an agreement being void, the fact that the compensation is contingent upon the outcome of the suit seems immaterial.⁸ If the witness, however, is not subject to the process of the court, either because he is beyond the jurisdiction, or the court is not authorized to subpoena witnesses, or the testimony is privileged, a contract to pay him for attending and testifying has been upheld.⁹ The same rules apply to expert (or *opinion*) witnesses as to testimony which they may be compelled to give under an ordinary subpoena,¹⁰ but agreements to compensate them in a fixed sum for extra services are valid.¹¹

The court in the principal case seems to put the decision upon the basis of a contract to procure evidence or testimony, that is, that plaintiff was

S. W. 1083 (but holding at same time the contract with the client procured by the layman champertous and void—an inconsistent view); *Irwin v. Curie* (1902) 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830.

7. See 8 Wigmore, *Evidence* (3rd ed. 1940) 130, §2202; *Henderson v. Hall* (1908) 87 Ark. 1, 112 S. W. 171, 25 L. R. A. (N. S.) 70; *Dodge v. Stiles* (1857) 26 Conn. 463; *Walker v. Cook* (1889) 33 Ill. App. 561; *Wright v. Somers* (1906) 125 Ill. App. 256; *Burchell v. Ledford* (1928) 226 Ky. 155, 10 S. W. (2d) 622; *State ex rel. Spillman v. First Bank of Nickerson* (1926) 114 Neb. 423, 207 N. W. 674, 45 A. L. R. 1418; *Cowles v. Rochester Folding Box Co.* (1903) 81 App. Div. 414, 80 N. Y. S. 811, aff'd (1904) 179 N. Y. 87, 71 N. E. 468; *Clifford v. Hughes* (1910) 139 App. Div. 730, 124 N. Y. S. 478; *Ramschassel's Estate* (1904) 24 Pa. Super. Ct. 262; *Pool v. Sacheverel* (1720) 1 P. Wms. 675, 24 Eng. Reprint 565.

8. *Dawkins v. Gill* (1846) 10 Ala. 206; *Pelkey v. Hodge* (1931) 112 Cal. App. 424, 296 Pac. 908; *Keown & McEvoy v. Verlin* (1925) 253 Mass. 374, 149 N. E. 115, 41 A. L. R. 1319; *Bowling v. Blum* (Tex. Civ. App. 1899) 52 S. W. 97; see *Perry v. Dicken* (1884) 105 Pa. 83, 51 Am. Rep. 181.

9. *Gaines v. Molen* (1887) 30 Fed. 27; *Lincoln Mountain Gold Min. Co. v. Williams* (1906) 37 Colo. 193, 85 Pac. 844; *Nickelson v. Wilson* (1875) 60 N. Y. 362; *Armstrong v. Prentice* (1893) 86 Wis. 210, 56 N. W. 742; *Thatcher v. Darr* (1921) 27 Wyo. 452, 199 Pac. 938, 16 A. L. R. 1442.

10. This is based upon the duty of a citizen to testify as to matters within his knowledge when called upon to do so, and an agreement to pay him more than the statutory amount is not only against public policy, but is without consideration. 8 Wigmore, *Evidence* (3rd ed. 1940) 130-137, §2203; *Burnett v. Freeman* (1909) 134 Mo. App. 709, 115 S. W. 488; *Collins v. Godefroy* (1831) 1 Barn. & Ad. 950, 109 Eng. Reprint 1040; see *Dixon v. State* (1912) 12 Ga. App. 17, 76 S. E. 794; *State v. Bell* (1908) 212 Mo. 111, 111 S. W. 24; *Ealy v. Shetler Ice Cream Co.* (1929) 108 W. Va. 184, 150 S. E. 539; contra, *Stanton v. Rushmore* (1933) 11 N. J. Misc. 544, 166 Atl. 707, aff'd (1934) 112 N. J. Law 115, 169 Atl. 721.

11. 8 Wigmore, *Evidence* (3rd ed. 1940) 130-137, §2203; *Tiffany v. Kellogg Iron Works* (1908) 59 Misc. 113, 109 N. Y. S. 754; see *Johnson v. Pietsch* (1901) 94 Ill. App. 459; *Barrus v. Phaneuf* (1896) 166 Mass. 123, 82 L. R. A. 619, 44 N. E. 141; *Burnett v. Freeman* (1907) 125 Mo. App. 683, 103 S. W. 121; *In re Schapiro* (1911) 144 App. Div. 1, 128 N. Y. S. 852; but see *Philler v. Waukesha County* (1909) 139 Wis. 211, 120 N. W. 829, 25 L. R. A. (N. S.) 1040, 131 Am. St. Rep. 1055, 17 Ann. Cas. 712.

hired to look up evidence on the question of the testator's sanity, and cites cases accordingly.¹² While the holding may be criticized as against the weight of authority on that ground,¹³ it is submitted that from the facts given in the opinion this was rather a contract with an *expert witness* for a contingent fee.¹⁴ The cases involving such contracts may be factually distinguished as contracts to pay an expert witness a share in the recovery¹⁵ and contracts to pay an expert witness a stipulated fee contingent upon success in the litigation.¹⁶ The courts have not attempted a distinction between the two and have uniformly held the contracts invalid, because they lead

12. *Bell County Bd. of Ed. v. Lee* (1931) 239 Ky. 317, 39 S. W. (2d) 492, which involved a contingent fee contract whereby plaintiff employed an auditor to audit a former sheriff's books, fee contingent on *finding evidence* to be used against sheriff in trial—*held, valid*; *Haley v. Hollenback* (1917) 53 Mont. 494, 165 Pac. 459, which involved a contract between a layman (defendant) and plaintiff whereby plaintiff agreed to *search for witnesses and testimony* to be used in the layman's suit, compensation to be contingent upon the layman's recovery in his action—*held, valid* (a distinction must be drawn between contracts entered into by the party litigant and contracts entered into by his lawyer—the former are more generally upheld, see, in this connection, 12 Am. Jur. 690, §188); and *Gross v. Campbell* (1928) 118 Ohio St. Rep. 285, 160 N. E. 852, which was a contract whereby plaintiff agreed to *procure evidence* regarding defrauding employees and others in defendant's company, compensation to be one-half of the amount recovered from the wrongdoers, *held, invalid* (case improperly cited by Missouri court).

13. For cases on this point, see notes 2, 3, above.

14. From the opinion (156 S. W. (2d) 597, 600) it is noted that plaintiff's services consisted of appearing as a witness, preparing himself for that task, and advising the attorneys during the various trials—but nowhere is it apparent that plaintiff *procured evidence*, unless conferring with counsel can be so understood.

15. *Von Kesler v. Baker* (1933) 131 Cal. App. 654, 21 P. (2d) 1017 (contract for payment of 25 per cent. of recovery or 20 per cent. of settlement to expert witness for testimony—*held, void*); *Thomas v. Caulkett* (1885) 57 Mich. 302, 24 N. W. 154, 58 Am. Rep. 369 (physician to testify at meeting of parties to make settlement, in return for a share of the amount recovered, *held, void*); *Sherman v. Burton* (1911) 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87 (physician to testify in personal injury claim in return for ½ of recovery, *held, void*); *In re Certain Lands* (1911) 144 App. Div. 107, 128 N. Y. S. 999, *aff'd In re City of New York* (1912) 204 N. Y. 625, 97 N. E. 1103 (corporation contracted to provide expert witnesses for ½ of recovery, *held, void*); *In re Schapiro* (1911) 144 App. Div. 1, 128 N. Y. S. 852 (disbarment proceeding against attorney who made such a contract, *held, void*); *Davis v. Smoot* (1918) 176 N. C. 538, 97 S. E. 488 (contract whereby physician agreed to testify favorably for plaintiff in personal injury action in consideration of 20 per cent. of amount recovered, in addition to fee as expert witness, *held, void*).

16. *Pollak v. Gregory* (N. Y. 1861) 9 Bosw. 116 (expert, in patent litigation); see *Wright v. Corbin* (1937) 190 Wash. 260, 67 P. (2d) 868, *Good-year Tire & Rubber Co. v. Overman Cushion Tire Co.* (C. C. A. 6, 1937) 95 F. (2d) 978, 982; *Johnson v. Pietsch* (1901) 94 Ill. App. 459, 460; *Stoedter v. Turner* (Mo. App. 1921) 237 S. W. 141, 144. See also 6 *Williston, Contracts* (2d ed. 1938) 4852-4855, §1716; 8 *Wigmore, Evidence* (3rd ed. 1940) 130-137, §§2202-2203; American Law Institute, *Restatement of the Law of Contracts* (1932) §552(2); 6 R. C. L. 756-757, §§163-164; and 12 Am. Jur. 691, §188.

to subornation of perjury, taint with corruption the atmosphere of courts, or prevent the course of justice.

In the language of the Missouri court, to hold a contract for a contingent witness fee invalid would "infer that a party litigant's testimony is false because he is interested in the outcome of his litigation."¹⁷ It is suggested that no such generalization could result from evidence submitted to sustain a party litigant's case. There is the basic doctrine that no witness can be disqualified from testifying because of his interest in the outcome of the action.¹⁸ But what court would deny that such an interest may be shown to affect his credibility? And surely the credibility of an expert witness testifying under a secret agreement¹⁹ for payment only in the event of a successful outcome of the action should be open to attack.²⁰ The issue is not the effect upon the jury of such testimony, it is the public policy which forbids an agreement to testify on that basis.²¹ The reason given is a *non sequitur*. Also the statement of the court, "Nor is there anything in the evidence tending to show that respondent's testimony and advice was not his honest opinion,"²² though acceptable as a fact admitted by the demurrer, is beside the point. The basic flaw in such agreements is not the harm done. Actual good might result, yet the agreement is void because of its subversive tendency. The formal effect of a demurrer does not cleanse the fact admitted of its vice.

R. S. S.

17. 156 S. W. (2d) 597, 602.

18. §1887, R. S. Mo. (1939) reads, "No person shall be disqualified as a witness in any civil suit or proceeding at law or equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility."

19. If the agreement is not secret, but the witness has a "known interest in the controversy," there is an exception to the general rule that a contingent contract for his testimony is invalid. *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.* (C. C. A. 6, 1937) 95 F. (2d) 978; *Wellington v. Kelly* (1881) 84 N. Y. 543; *Thatcher v. Darr* (1921) 27 Wyo. 452, 199 Pac. 938, 16 A. L. R. 1442; cf. *Gaines v. Molen* (C. C. E. D. Ark., 1887) 30 Fed. 27; *Smith v. Hartsell* (1908) 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203; *Perry v. Dicken* (1884) 105 Pa. 83, 51 Am. Rep. 181; but see *Cowles v. Rochester Folding Box Co.* (1903) 81 App. Div. 414, 80 N. Y. S. 811, aff'd (1904) 179 N. Y. 87, 71 N. E. 468.

20. See *Rules for the Government of the Supreme Court of Missouri* (1942), Rule 35 (39), which reads, "* * * Upon request by the court or adverse counsel, the amount of compensation demanded or received by any witness in excess of the statutory allowance shall be disclosed." While this provides collateral protection against the possible evils of contingent witness fees, it is not enough.

21. In *Rice v. Wood* (1873) 113 Mass. 133, a case involving another type of void contract, the court at page 135 gives a very concise statement of why some contracts are held void when it says, "The law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency."

22. 156 S. W. (2d) 597, 602.